06- 823 ~~No. 06-828~~

FILED

JAN 16 2007

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

MOSHE TAL; BRICKTOWN 2000, INC.; and TAL TECHNOLOGIES, INC.,

Petitioners,

v.

DAN RANDOLPH HOGAN; TMK/HOGAN JOINT VENTURE, a.k.a. COMMERCIAL REAL ESTATE SERVICES JOINT VENTURE; HOGAN PROPERTY MANAGEMENT, L.L.C.; BRICKTOWN-TMK/HOGAN PARKING, L.L.C., a.k.a. BRICKTOWN-SMC/HOGAN, L.L.C.; BRICKTOWN-TMK/HOGAN ENTERTAINMENT, L.L.C., a.k.a. BRICKTOWN ENTERTAINMENT, L.L.C.; MARK D. ELGIN; STONEGATE MANAGEMENT COMPANY L.L.C.; ELGIN DEVELOPMENT COMPANY, L.L.C.; TDC COMPANY, L.L.C.; AND TIANA P. DOUGLAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TIANA DOUGLAS

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QUESTIONS PRESENTED

1. Did the Tenth Circuit Court of Appeals limit its application of the more stringent pleading requirements in Fed. R. Civ. P. Rule 9(b) to only the fraud/racketeering elements of Petitioners' RICO claims?

2. Was dismissal of Tal Technologies, Inc.'s (hereinafter "TTI") claims under the Sherman Act consistent with federal jurisprudence?

3. Did the *Parker* doctrine provide immunity to Respondent Douglas from Petitioners' antitrust claims, and was that doctrine properly applied by the Tenth Circuit?

4. Was the Tenth Circuit correct in applying the *Rooker-Feldman* doctrine to those claims predicated on an alleged fraudulent condemnation, given the breadth of previous litigation surrounding the issue including a final state-court judgment from the Oklahoma Supreme Court?

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JURISDICTION

On June 29, 2006, the Tenth Circuit issued its decision affirming the District Court judgment dismissing Petitioners' Second Amended Complaint. (Pet. App. A1-A45). The opinion is reported at 453 F.3d 1244. Petitioners sought rehearing on July 17, 2006. The Court of Appeals denied the Petition for Rehearing on September 11, 2006. (Pet. App. A46). The Petition for a Writ of Certiorari was filed on December 11, 2006.[1] Jurisdiction is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Introduction

As noted by the Tenth Circuit Court of Appeals in its thorough and well-reasoned June 29, 2006 Opinion, the present case is a direct by-product of recurrent and perpetual "frivolous" litigation initiated by the Petitioners against Respondent and other third parties.[2] Over the

[1] Petitioners' Petition for a Writ of Certiorari wholly fails to adhere to the Rules of the Supreme Court. This is yet another example of Petitioners' recalcitrance and utter disrespect for proper protocol and the decisions rendered by previous courts. Respondent moves to strike the Petition for failing to comply with the restrictions governing the font size of text and footnotes. Additionally, the Petition disregards the margin and text field requirements set forth in Rule 33. Petitioners also make specific allegations which are unsupported and outside of any record presented. *See*, Petition, at p. 27, fn. 13. The result of Petitioners' obstinance is an endless document with discordant and untenable ramblings.

[2] In *State ex rel. Tal v. City of Oklahoma City*, 19 P.3d 268, 272 (Okla. 2000), Justice Watt issued a separate written opinion, wherein he expressed his disapproval of the vexatious behavior exhibited by Moshe Tal.

course of nearly ten years, Petitioners have filed and/or been involved with numerous legal proceedings which concern the same issues presented in the underlying United States District Court case. The questions propounded herein do not warrant issuance of a writ of certiorari. Petitioners simply represent an on-going saga involving a malcontent landowner, insistent on refiling the same lawsuits over and over to exact his revenge on Oklahoma City.

Background

In accordance with Oklahoma law, the City of Oklahoma City created an entity known as the Oklahoma City Urban Renewal Authority ("OCURA"). (Pet. App., at A4). Respondent Tiana Douglas ("Douglas") acted as the executive director of OCURA at all times relevant herein. (*Id.*). Beginning in 1976, Oklahoma City embarked on an effort to restore an area of the metro known as "Bricktown." (*Id.*). The revitalization of Bricktown became most prolific during the late 1990's.

Petitioner TTI was the owner of certain real property located within Bricktown. (Pet. App., at A5). On March 25, 1997, Oklahoma City initiated a condemnation action to obtain two tracts of land owned by TTI, for the intended purpose of creating public parking, public recreation and park areas. (*Id.*). Although TTI objected to the use of eminent domain, a condemnation order was entered by the Oklahoma County District Court on August 28, 1997, and amended on October 2, 1997.[3] TTI did not seek a timely

[3] This litigation has been referred to as Tal Technologies, Inc. I ("TTI-I").

appeal of these orders in State Court. (Pet. App., at A5). However, TTI did file motions approximately two years after the final judgment, urging reconsideration of the condemnation orders.[4] (Pet. App., at A7). These motions were premised, at least in part, on alleged fraudulent conduct during the condemnation process. (*Id.*). On review the Oklahoma Court of Civil Appeals affirmed the final condemnation order. TTI's attempts to obtain certiorari review in both the Oklahoma and United States Supreme Court were denied.[5] (*Id.*).

As part of the urban renewal process, TTI and Bricktown, Inc., began submitting proposals to obtain redevelopment contracts in Bricktown. (Pet. App., at A5). After extensive debate, public hearings, and citizen review, the redevelopment contracts were awarded to TMK/Hogan rather than TTI or Bricktown, Inc. (*Id.*).

In the fall of 1998, Tal initiated a *qui tam* lawsuit against Oklahoma City which concerned operation of the Bricktown Ballpark.[6] (Pet. App., at A6). In response Oklahoma City filed a petition seeking declaratory judgment, and requested an order dismissing Tal's claims. The trial court dismissed Tal's claims and again the Oklahoma Supreme Court affirmed. *State ex rel. Tal v. Norick*, 991 P.2d 999, 1001 (Okla. 1999). (*Id.*). A disgruntled Tal then issued a written demand on January 12, 1999, alleging that the taking of TTI's land was constitutionally improper

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[4] Okla. Stat. tit. 12, § 1031 and § 1038 authorize a party to seek vacation, amendment and/or modification of any state court judgment procured by fraudulent means.

[5] *Tal Technologies, Inc. v. City of Oklahoma City*, 535 U.S. 987, 122 S. Ct. 1539, 152 L.Ed.2d 465 (2002).

[6] This matter has been referred to by previous courts as "Tal II."

and the product of "bid rigging."[7] (*Id.*). In response, Oklahoma City filed a declaratory judgment action against OCURA to ascertain whether the "taking" and the subsequent transfer of TTI's land were proper.[8] (*Id.*). A judgment was entered finding the Redevelopment Agreements between the City and OCURA to be "valid, lawful and constitutional in all respects . . . " Again the matter was presented and reviewed by the Oklahoma Appellate Courts. The Oklahoma Supreme Court endorsed the declaratory judgment, explaining:

> [T]here is nothing in the record to reflect that Oklahoma City acted in bad faith. Its actions were taken under the glare of public scrutiny and resisted by a significant minority of the City Council.

City of Oklahoma City v. Oklahoma City Urban Renewal Auth., 988 P.2d 901, 906 (Okla. 1999). Now two final state court judgments have considered and directly addressed the legality of the condemnation proceedings.

Undaunted, Tal filed yet another *qui tam* suit on March 15, 2000, against Oklahoma City, OCURA, and a plethora of individuals and companies.[9] (Pet. App., at A7). The matter was once more dismissed by the trial court. On appeal, the Oklahoma Supreme Court recognized the blatant abuse of process engaged in by Tal:

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[7] The demand was also made under the color of Oklahoma's *qui tam* statutes. Okla. Stat. tit. 62, §§ 372-373.

[8] This proceeding is referred to by the lower federal courts as "Tal I."

[9] "Tal III."

> That holding [*Tal I*] should have ended Tal and T.A.R.'s attacks against the City and the other participants in the Bricktown development projects but it did not do so. We hold that Tal and T.A.R.'s claims here were clearly and unequivocally disposed of in *Tal I*. Further, Tal and T.A.R. violated our rules in failing to divulge in their petition in error in this appeal the relationship between this appeal, *Tal I*, and *Tal II*.

State ex rel. Tal v. City of Oklahoma City, 19 P.3d 268, 272 (Okla. 2000). Concurring in part and dissenting in part, Justice Watt went even further than the majority:

> I dissent, however, because of the majority's failure to address what is to me quite clear: that Tal and T.A.R.'s conduct in filing and prosecuting this action is likely sanctionable . . . *this is but the latest episode in serial lawsuits and appeals by Tal and T.A.R. that have hindered the Bricktown project*, including, according to appellees, the loss of investors who have refused to participate only because of this constant litigation.

Id. at 272 (emphasis added). Tal attempted to secure a writ of certiorari in this Court, but was denied on October 1, 2001. *Oklahoma ex rel. Tal v. City of Oklahoma City*, 534 U.S. 814, 122 S. Ct. 40, 151 L.Ed.2d 13 (2001).

Petitioners file federal action

Knowing he would face harsh sanctions with continued litigation in state court, Tal turned his efforts to the United States District Courts.[10] Tal, TTI and Bricktown,

[10] Tal was actually sanctioned, harshly, by the Oklahoma County District Court in direct response to the bad faith misconduct exhibited

(Continued on following page)

Inc., filed their original Complaint (signed only by Moshe Tal) in the Western District of Oklahoma on March 14, 2002. (Pet. App., at A7). A First Amended Complaint was filed on April 1, 2002. (Pet. App., at A8). However, Tal was ordered by the District Court to retain counsel on behalf of his two corporate entities. (*Id.*). After TTI and Bricktown, Inc., secured counsel, Respondent Douglas and her co-defendants each filed motions to dismiss. (*Id.*). Following a hearing, the District Court sustained the motions, but granted Petitioners leave to amend their RICO and Sherman Act claims. (*Id.*). A Second Amended Complaint was filed on December 16, 2002, in which Petitioners alleged antitrust and RICO violations against Respondents, together with purported breaches of state tort laws. (*Id.*). Respondent Douglas and her co-defendants responded with motions to dismiss the Second Amended Complaint. (Pet. App., at A8-A9). The District Court granted Respondents' motions on September 30, 2003, and an appeal to the Tenth Circuit Court of Appeals ensued. (Pet. App., at A9).

Appeal and Tenth Circuit Affirmation

The Tenth Circuit affirmed the District Court's dismissal on all counts. First, the Tenth Circuit considered Petitioner Tal's individual claims. Upholding the District Court's dismissal, the Circuit Court found that Tal lacked standing to pursue claims under RICO and/or the

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in his unending legal filings. Although the Supreme Court of Oklahoma reversed the lower court's attorney fee award, the proverbial handwriting was on the wall – any further state court litigation would likely be met with punitive measures. *See*, *State ex rel. Tal v. City of Oklahoma City*, 61 P.3d 234 (Okla. 2002).

Sherman Act.[11] (Pet. App., at A10-A12). Their conclusion was based on the absence of any direct injury to Tal himself. Justice O'Brien summarized the Court's decision:

> As the district court held, Tal does not have standing to assert his individual RICO and antitrust claims because he has not shown that he suffered an antitrust injury as a result of the Appellees' actions. At best, TTI, as owner of the condemned property, suffered from the alleged fraudulent condemnation, and Bricktown, Inc., which submitted the redevelopment bid, suffered from the alleged Sherman Act and RICO violations as they relate to the award of development contracts.

(Pet. App, at A12). The Circuit Court's opinion does not specifically address Tal's personal claims in the context of claim or issue preclusion.

Next, the Tenth Circuit determined TTI's condemnation claim was barred under the *Rooker-Feldman* doctrine. (Pet. App., at A15). As set forth above, TTI was involved in an earlier legal proceeding concerning the condemnation of his property. The Tenth Circuit applied the doctrine because "Oklahoma courts squarely considered and rejected TTI's claims that the initial condemnation order had been obtained through fraud." (Pet. App., at A17). The

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[11] It appears, albeit not clearly, that Petitioner Tal acquiesces to the Circuit Court's dismissal of his individual federal claims. Confusingly, Tal seems to argue that his state law tort claims should not have been dismissed by the Tenth Circuit. However, a pendant claims dismissal was proper once all federal claims were eliminated. 28 U.S.C. § 1367(c)(3). Judge Friot exercised his right to decline supplemental jurisdiction of the state law claims as authorized by Section 1367. (Pet. App., at A74).

Court also rejected TTI's suggestion that *Rooker-Feldman* is inapposite because new defendants were named. (Pet. App., at A18). Further, the opinion emphasized the role of Oklahoma's own legal system in addressing any new allegations of fraud as they pertain to the condemnation action. (Pet. App., at A17).

The Circuit Court next approved the District Court's dismissal of Bricktown, Inc.'s antitrust claims against Douglas for lack of standing. (Pet. App., at A20). To reach this decision, the Court applied the *Parker* doctrine to shield Douglas from Bricktown, Inc.'s antitrust claims. (Pet. App., at A22-A23). As an alternative resolution of the legal issue, the Court of Appeals determined the Second Amended Complaint did not sufficiently plead an antitrust violation against Douglas. (Pet. App., at A25). According to the Circuit Court, Bricktown, Inc. merely raised "bald allegations of 'conspiracy' and 'bid-rigging,'" which are insufficient to support an alleged Sherman Act violation. (Pet. App., at A26).

The Court of Appeals also affirmed Judge Friot's order disposing of each of Petitioners' RICO claims. After applying Fed. R. Civ. P. 9(b)'s stricter pleading requirements to the predicate acts of fraud alleged in the Second Amended Complaint, the Tenth Circuit found sufficient details to support mail and wire fraud. (Pet. App., at A35-A37). Although the Court questioned whether Petitioners had adequately plead "a pattern of racketeering activity," the allegations were deemed sufficient for purposes of the Court's analysis. (Pet. App., at A40). Petitioners sought relief under 18 U.S.C. § 1962(b), (c) and (d) of the RICO Act. After analyzing the claims under each of the relevant sections, the Court of Appeals held that Petitioners had failed to plead prima facie RICO causes of action. (Pet.

App., at A40-A44). Only the acts of fraud alleged in Petitioners' RICO case were subjected to the tougher standards of Rule 9.

Finally, the Tenth Circuit followed 28 U.S.C. § 1367(c)(3) when it affirmed the District Court's refusal to exercise supplemental jurisdiction over Petitioners' state law claims. (Pet. App., at A45).

REASONS FOR DENYING THE PETITION FOR CERTIORARI

Assumption of jurisdiction by way of certiorari is not intended to serve as a means for the mere correction of alleged errors by the lower federal courts. *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 521, 530-531, 77 S. Ct. 459, 1 L.Ed.2d 515 (1957). Rather it is to be "exercised sparingly" in order to "secure uniformity of decision between the Circuit Court of Appeals." *Id.*

I. The Tenth Circuit Court of Appeals' Decision to Affirm the Dismissal of Petitioners' RICO Claims was in Harmony with Extant Jurisprudence.

A. The Circuit Court applied Fed. R. Civ. P. Rule 9 *only* to the fraud/racketeering elements of Petitioners' RICO claims.

Initially, Petitioners suggest certiorari should be granted due to a perceived misapplication of Fed. R. Civ. P. Rule 9(b) to every element of the RICO claims in their

Second Amended Complaint.[12] Yet, this first proposition is wholly without merit and founded on an absolute misstatement of the Tenth Circuit's ruling in this case. The only aspect of Petitioners' RICO claims subject to the heightened pleading requirements of Rule 9 were the "predicate" acts of mail fraud and wire fraud – a proper application of federal law. Consequently, Petitioners fail to meet the threshold requirement which would warrant review by this Court.

To establish a viable civil claim under the RICO Act, a plaintiff must show (1) investment in, control of, or conduct of (2) an enterprise (3) through a pattern (4) of racketeering activity. 18 U.S.C. § 1962(a)-(c). The term "racketeering activity" is defined in 18 U.S.C. § 1961(1), and it includes bribery, mail fraud and wire fraud. Affirming Judge Friot's dismissal of TTI and Bricktown, Inc.'s RICO claims, the Tenth Circuit recognized the Second Amended Complaint and RICO Case Statements alleged fraud and bribery as the racketeering predicates mandated by Title 18 U.S.C. § 1962(a), (b) and (c).[13] (Pet. App., at A28). Not only was the Tenth Circuit's analysis and application consistent with its own prior decisions, it is in accord with other Circuit Courts, the Supreme Court, and the precise wording of Rule 9. Fed. R. Civ. P. Rule 9(b) provides:

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[12] The Circuit Court considered both the Second Amended Complaint and Petitioners' RICO Case Statement when assessing whether the pleadings were adequate to survive a 12(b)(6) motion. (Pet. App., at A28).

[13] Under RICO, "racketeering activity" includes mail fraud, wire fraud and racketeering. 18 U.S.C. § 1961(1).

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Application of the strict requirements of Rule 9 to cases involving allegations of fraud has been recognized by this Court. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L.Ed.2d 517 (1993); *Swierkiewicz v. Sorema, N. A.*, 534 U.S. 506, 513, 122 S. Ct. 992, 152 L.Ed.2d 1 (2002). Likewise, the Circuit Courts uniformly adhere to the directive in Rule 9(b). *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 226 (1st Cir. 2004); *First Capital Asset Management, Inc. v. Satinwood, Inc.*, 385 F.3d 159, 178-179 (2nd Cir. 2004); *Lum v. Bank of America*, 361 F.3d 217, 223-224 (3rd Cir. 2004); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783-784 (4th Cir. 1999); *Tel-Phonic Services, Inc. v. TBS Intern., Inc.*, 975 F.2d 1134, 1138-1139 (5th Cir. 1992); *Advocacy Organization for Patients and Providers v. Auto Club Ins. Assn.*, 176 F.3d 315, 322 (6th Cir. 1999); *Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d 467, 468-470 (7th Cir. 1999); *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 549-550 (8th Cir. 1997); *Lancaster Comm. Hospital v. Antelope Valley Hospital Distr.*, 940 F.2d 397, 405 (9th Cir. 1991); *Brooks v. Blue Cross & Blue Shield of Florida*, 116 F.3d 1364, 1380-1381 (11th Cir. 1997); *Danielson v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1229 (C.A. D.C. 1991).

The Tenth Circuit is no different, applying Rule 9(b)'s heightened pleading requirements only to the extent Plaintiff's RICO claims allege fraudulent conduct. *Cayman*

Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1362 (10th Cir. 1989). Petitioners completely misstate the Tenth Circuit's existing legal application of Rule 9(b), suggesting that the appellate court uses "the heightened pleading requirement of Fed. R. Civ. P. 9(b) for all elements of RICO." Recently the Tenth Circuit recognized the importance of limiting Rule 9(b) to issues grounded in fraud. In *Robbins v. Wilkie*, 300 F.3d 1208, 1211 (10th Cir. 2002), the Circuit Court expressly rejected the heightened pleading requirements of Rule 9(b) for proving "damages" in a civil RICO case. The Court relied on the Supreme Court's holding in *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256, 114 S. Ct. 798, 127 L.Ed.2d 99 (1994) (plaintiff's injuries in RICO case subject to general rules of pleading in Rule 8). Therefore, it is clear that the Tenth Circuit properly limits the use of Rule 9(b) to those RICO claims which allege fraud as the predicate act.

Despite Petitioners' suggestion, the Tenth Circuit did not apply Rule 9(b) in a manner inconsistent with the laws of the United States or prior decisions from this Court. Reviewing the case *de novo*, the Circuit Court only applied the heightened pleading requirement of Rule 9(b) to the fraudulent elements of Petitioners' RICO claims. Because Petitioners have failed to demonstrate a legitimate basis for certiorari jurisdiction, the Petition should be denied inasmuch as there is error alleged with respect to dismissal of the RICO claims.

B. Petitioners' RICO claims were dismissed as a result of a failure to plead a *prima facie* case under 18 U.S.C. § 1962 and not because of an improper application of Rule 9.

After applying Rule 9 to the predicate acts of mail fraud and wire fraud, the Tenth Circuit concluded that the Petitioners had sufficiently alleged mail and wire fraud in their Second Amended Complaint. (Pet. App., at A35-A37). Thereafter, the Court inspected the remaining allegations surrounding Petitioners' RICO claims to determine if they could withstand a 12(b)(6) challenge. The Court raised serious doubts about whether Petitioners had made sufficient allegations to establish "a pattern of racketeering activity." (Pet. App., at A39). Nevertheless, the Tenth Circuit found the allegations were sufficient to withstand a 12(b)(6) motion. This clearly demonstrates that the Tenth Circuit did not weigh Petitioners entire RICO claim under Rule 9(b).

1. Petitioners' 18 U.S.C. § 1962(b) claim.

Evaluating the Section 1962(b) claim, the Court held that Petitioners failed to provide sufficient allegations to show "an interest in or control of the Renewal Authority or the city council" by way of the predicate acts. (Pet. App., at 42). Under Section 1962(b), a party must adequately plead that a defendant (1) acquired or maintained an interest in or control of, (2) an enterprise engaged in interstate commerce, (3) through a pattern, (4) of racketeering activity, or collection of an unlawful debt. Petitioners were required by 1962(b) to allege a nexus between control over the enterprise and the racketeering activity. *Wagh v. Metris Direct*, 363 F.3d 821, 830 (9th Cir. 2003) (affirming 12(b)(6) dismissal of 1962(b) claim for failure to adequately

plead connection between predicate acts and control). Because Petitioners failed to do so, the Circuit Court, without applying Rule 9, found the Second Amended Complaint to be deficient for purposes of a Section 1962(b) claim. (Pet. App., at A42). Petitioners have not demonstrated how dismissal of a complaint for failure to plead each element is somehow contrary to decisions in other Circuits or this Court. In fact, the Supreme Court denied certiorari on this precise issue in *Wagh*. *See*, *Wagh v. Metris Direct, Inc.*, 541 U.S. 1043, 124 S. Ct. 2176, 158 L.Ed.2d 733 (2004).

2. Petitioners' 18 U.S.C. § 1962(c) claim.

To withstand a challenge under Rule 12(b)(6), a plaintiff seeking relief through Section 1962(c) of RICO must satisfactorily plead (1) participation in the conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. *Cayman Exploration Corp.*, 873 F.2d at 1362. The Tenth Circuit utilized this Court's "operation or management" test[14] when analyzing whether Douglas participated in the conduct of an enterprise. (Pet. App., at A43). Because the Petitioners failed to allege Douglas' involvement in any of the predicate acts, the Second Amended Complaint failed to state a claim under Section 1962(c). (Pet. App., at 43). As set forth previously, the Tenth Circuit never used Rule 9 in its review of the 1962(c) RICO claim. The Court only found Petitioners had neglected to plead a *prima facie* case. *See*, *Slaney v. Intl. Amateur Athletic Federation*, 244 F.3d 580, 598-599, *cert.*

[14] *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S. Ct. 1163, 122 L.Ed.2d 525 (1993).

denied, 534 U.S. 828, 122 S. Ct. 69, 151 L.Ed.2d 35 (2001) (finding dismissal under 12(b)(6) proper where plaintiffs failed to allege sufficient facts to support 1962(c) claim).

3. Petitioners' 18 U.S.C. § 1962(d) claim.

Because both of Petitioners' other RICO claims under 1962(b) and 1962(c) were insufficient, the Tenth Circuit correctly affirmed the dismissal of the claim under 1962(d). *Edwards v. First Nat. Bank of Bartlesville*, 872 F.2d 347, 352 (10th Cir. 1989), *Lum v. Bank of America*, 361 F.3d 217, 227, fn. 5 (3rd Cir. 2004), *cert. denied*, *Hing Quan Lum v. Bank of America*, 543 U.S. 918, 125 S. Ct. 271, 160 L.Ed.2d 203 (2004), *Howard v. America Online, Inc.*, 208 F.3d 741, 751 (9th Cir. 2000), *cert. denied*, *Howard v. America Online, Inc.*, 531 U.S. 828, 121 S. Ct. 77, 148 L.Ed.2d 40 (2000).

C. Heightened pleading standards were not applied to the predicate act of "bribery" for purposes of Petitioners' RICO claims.

Petitioners also failed to plead their allegations of bribery with adequacy. More importantly, the Tenth Circuit did not utilize a more stringent test for evaluating the predicate act of bribery. Not once does the Tenth Circuit mention Rule 9(b) in the same breath with the bribery claim. (Pet. App., at A37-A38). Contrary to the Petitioners' assertion, the Circuit Court simply concluded the bribery allegation was insufficient.[15]

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[15] Although Petitioners do not contest the denial of leave to amend their Second Amended Complaint, such a ruling is purely discretionary.

(Continued on following page)

It is undisputed that bribery is "racketeering activity" under RICO. 18 U.S.C. § 1961(1). To utilize bribery as the catalyst for a RICO claim, a Plaintiff must sufficiently set forth (1) facts adequate to support a finding of bribery under 18 U.S.C. § 201, or (2) allegations which would present a legitimate violation of state bribery laws. 18 U.S.C. § 1961(1). Consistent with this standard, the Circuit Court found Petitioners had failed to properly assert a bribery allegation under 18 U.S.C. § 201. The Court also noted that Bricktown, Inc., and TTI conceded their inability to sufficiently raise a proper claim of bribery under federal law. (Pet. App., at A37). Petitioners never alleged in their Second Amended Complaint or RICO Case Statement that Douglas (or the other Respondents) had violated a state bribery statute. Therefore, under the general pleading requirements of Rule 8, Petitioners failed to adequately state a claim for which relief could be granted. Rule 9 and the heightened pleadings requirements mandated therein were never employed by the Tenth Circuit. Requiring Petitioners to present factual statements, which, at a minimum, set forth the necessary elements of a cause of action, does not amount to reviewing the case under Rule 9(b).

Petitioners have failed to demonstrate that the Circuit Court took action which was contrary to the United States Constitution, Supreme Court precedent, or in conflict with the decisions from any of the other intermediate federal courts. Therefore, the Petition for a Writ of Certiorari should be denied.

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330, 91 S. Ct. 795, 28 L.Ed.2d 77 (1971).

II. Dismissal of Petitioners' claims under the Sherman Act was proper under the *Parker* doctrine and was not in discord with federal law.

Once again Petitioners misrepresent the actual basis behind the Tenth Circuit's decision to uphold the dismissal of the antitrust claims contained in the Second Amended Complaint. First, TTI's antitrust claims were dismissed solely on the basis of standing. The claims levied by Bricktown, Inc. failed to state a claim because Douglas was immune from liability under *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L.Ed.2d 315 (1943). Douglas' co-defendants were protected by way of and the *Noerr-Pennington* doctrine.[16]

The Circuit Court found that TTI lacked standing to assert causes of action under the Sherman Act. This was due to the fact that TTI's purported injuries were ancillary and only a derivative of the alleged antitrust violations suffered by Bricktown, Inc. (Pet. App., at A20). Such a holding is entirely consistent with Supreme Court precedent. *See*, *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 539-540, 103 S. Ct. 897, 74 L.Ed.2d 723 (1983), *Hawaii v. Standard Oil of California*, 405 U.S. 251, 264, fn. 14, 92 S. Ct. 885, 31 L.Ed.2d 184 (1972), *see also*, *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L.Ed.2d 707 (1977) (finding that only direct buyers of products from manufacturer could assert antitrust case

[16] The *Noerr-Pennington* doctrine is a culmination of *Eastern Railroad President Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L.Ed.2d 464 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L.Ed.2d 626 (1965).

and rejecting secondary buyers' claims). Therefore, TTI's suggestion that its antitrust claims were dismissed after being subjected to a more rigorous inspection of the allegations is unfounded and it does not support the request for a writ of certiorari.

Dismissal of Bricktown, Inc.'s antitrust claims was based on the Tenth Circuit's application of the *Parker* and *Noerr-Pennington* doctrines. While Petitioners acknowledge the Circuit Court's reliance on these legal axioms, they do not attack their proper application in this case. According to *Parker*, states are free to engage in anticompetitive enterprises without repercussions under the Sherman Act. When state law permits, municipalities may also be immune from antitrust liability. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39, 105 S. Ct. 1713, 85 L.Ed.2d 24 (1985). As noted by the Tenth Circuit, Oklahoma enacted legislation[17] which authorized the creation of "urban renewal authorities." (Pet. App., at A22). Approving of the District Court's analysis on the issue, the Circuit Court concluded that the Oklahoma statutes created inherent authority in the urban renewal authorities to engage in anticompetitive behavior. (Pet. App., at A22). Consequently, Respondent Douglas is entitled to immunity under *Parker* – precisely the decision reached by the Court of Appeals. (Pet. App., at A22).

As an alternative theory in support of dismissal, the Tenth Circuit found that Bricktown, Inc.'s antitrust claims were insufficient as a matter of law. However, as indicated herein above, their principal justification for upholding the dismissal of the antitrust cause of action against

[17] Okla. Stat. tit. 11, § 38-101 to 123.

Respondent Douglas was based on the *Parker* doctrine. Petitioners suggest that the Circuit Court mistakenly subjected the antitrust allegations to rigors of Rule 9. Nowhere in the Court's discussion of the adequacy/inadequacy of the antitrust claims does the Court ever refer to Rule 9.

III. *Rooker-Feldman* was clearly applicable to the Petitioners' claims, and the Tenth Circuit's use of that doctrine was not contrary to established Supreme Court precedent.[18]

Without a doubt, the Tenth Circuit correctly applied the *Rooker-Feldman*[19] doctrine to TTI's RICO claims based on an alleged fraudulent condemnation of the subject property in Bricktown. Furthermore, the Court of Appeals weighed this Court's recent narrowing of the doctrine. Petitioners argue that the Tenth Circuit's use of *Rooker-Feldman* in this case conflicts with recent decisions in this Court.

In the recent case of *Lance v. Dennis*, 126 S. Ct. 1198, 163 L.Ed.2d 1059 (2006), *Rooker-Feldman* was revisited by this Court. The foundation behind the *Rooker-Feldman*

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[18] Confusingly, Petitioners claim the Tenth Circuit acted in contravention of Supreme Court precedent by applying principles of claim and issue preclusion to the Second Amended Complaint. However, the Court of Appeals did not rely on claim or issue preclusion to reach its decision. Thus, this issue is not addressed by Douglas herein and is not proper for certiorari review.

[19] The *Rooker-Feldman* doctrine originated from *Rooker v. Fidelity Trust Company*, 263 U.S. 413, 44 S. Ct. 149, 68 L.Ed. 362 (1923) and this Court's subsequent opinion in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L.Ed.2d 206 (1983).

doctrine is set forth in 28 U.S.C. § 1257, which provides that the United States Supreme Court holds exclusive jurisdiction over appeals from final state-court judgments. *Lance*, at 1200. Consequently, the doctrine prohibits lower federal courts from exercising jurisdiction over state-court judgments which have been fully resolved. *Id.*, at 1201. The preclusive effect of *Rooker-Feldman* is triggered when claims have been actually decided by a state court or are inextricably intertwined with a prior state-court judgment. *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229, 1233 (10th Cir. 2006), citing *Rooker*, 263 U.S. at 415-16, and *Feldman*, 460 U.S. at 483, n. 16.

Emphasizing the doctrine's narrow reach, the *Lance* Court, *per curiam*, reiterated that application of *Rooker-Feldman* is limited to:

> [C]ases brought by ***state-court losers*** complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. (Emphasis added).

Lance, at 1201, quoting *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L.Ed.2d 454 (2005). While *Lance* and *Exxon* both command limitations on the scope of *Rooker-Feldman*, neither case urges a complete abrogation of the doctrine's fundamental precepts. Further, the pronouncements in those cases are readily distinguishable from application of *Rooker-Feldman* to TTI's claims of fraudulent condemnation.

First, as described previously, TTI was the owner of the parcels of land procured through eminent domain. Additionally, TTI was the ***losing party*** in state-court

litigation involving the condemnation of the subject properties. TTI's initial assertion of "fraudulent condemnation" was made in the state-court action. After the Oklahoma Supreme Court declined review, TTI's request for certiorari review was rejected by this Court. *See*, *Tal Technologies, Inc. v. City of Oklahoma City*, *supra* fn. 5. The scenario presented is a "text-book" example of what *Rooker-Feldman* is designed to prohibit. Petitioners allege that the Tenth Circuit erred by applying *Rooker-Feldman* based on the *qui tam* proceedings initiated by Moshe Tal and Taxpayers Against Ripoffs ("TAR"). (*See*, Petition, at p. 21-23). This argument is entirely gratuitous. The Court of Appeals expressly relied on TTI's assertions of fraud in the condemnation action; the subsequent ratification of that judgment in the Oklahoma Court of Civil Appeals; the Oklahoma Supreme Court's denial of certiorari in the matter; and this Court's decision to decline review. (Pet. App., at A5, A7, A17). To the extent Bricktown, Inc., alleges error for misapplication of *Rooker-Feldman* it is unsupported. Bricktown, Inc. had no viable claim based on fraudulent condemnation as it was not the owner of the land in question. The Tenth Circuit never considered an alleged claim of fraud on the part of Bricktown, Inc. because they were not the owner of the condemned property. (Pet. App., at A12). Petitioners also try to suggest *Rooker-Feldman* is ineffectual when parallel state-court litigation is pending. First, the "parallel" state-court proceedings referenced by Petitioners could hardly have been considered parallel. As Petitioners admit, one of the state-court cases was not even initiated until after the District Court had sustained the 12(b)(6) motions. The other "parallel" case is an attempt, once more, to collaterally attack the final judgment in the condemnation case.

Second, Petitioners' argument is flawed in that it assumes the parallel state-court case is well-founded and not subject to dismissal under the law of the case doctrine. If the Court were to allow such an interpretation of *Exxon*, litigants could thwart any attempts at dismissing federal lawsuits by initiating meritless (or persistent) actions in state-court.

Third, Petitioners' subsequent litigation is irrelevant, because TTI *lost* its pursuit of the fraudulent condemnation claim when it was denied certiorari by the Oklahoma Supreme Court. Under *Rooker-Feldman*, dismissal is required once a defendant establishes that the federal court plaintiff lost a final decision in state-court on the same issues. That is precisely what happened and why the Tenth Circuit applied the doctrine to dispense with the fraudulent condemnation claim. The mere fact that Petitioners have once again embarked on a mission to pursue the same frivolous litigation does not remove the claim from the purview of *Rooker-Feldman*.

Accordingly, the question of whether TTI's land was obtained by fraudulent means is "law of the case," and was properly excluded by the District Court under the *Rooker-Feldman* doctrine. Petitioner has failed to establish a proper basis for certiorari review of this issue, and therefore, the Petition should be denied.

CONCLUSION

Nothing presented by the Petitioners approaches what is necessary to be granted a writ of certiorari. It is clear the Tenth Circuit strictly applied the legal principles prescribed by this Court. Petitioners have primarily presented this Court with bald assertions, utterly failing to meet their burden of demonstrating that the Circuit Court's decision warrants review. The Petition offered no legal support to show the Court of Appeals' findings were inconsistent with prior decisions from the Supreme Court. It also presented nothing which reflects the Court's opinion was divergent from the rules of law established by other Circuits. Perhaps more compelling is the sheer volume of cases which have already resolved the issues presented. Despite Petitioners' attempts to convince this Court of the case's novelty, the Petition offers nothing more than hyperbole and misinterpretations of the Tenth Circuit's opinion. In light of the lack of any adequate justification for certiorari jurisdiction, the Petition in this case should be denied *in toto*.

Respectfully submitted,

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